IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

:::

JUDGMENT

Ramjilal & Ors. vs. Om Prakash & Ors.

S.B.CIVIL SECOND APPEAL NO.98/2005 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 29.11.2002 PASSED BY SHRI R.C. RAMDHARI, ADDITIONAL DISTRICT JUDGE, RAJGARH, DISTRICT CHURU IN APPEAL NO.6/2000.

DATE OF JUDGMENT ::: 10.11.2005

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. R Hedau, for the appellants.

- - - - -

BY THE COURT:

Heard learned counsel for the appellants.

The appellants are aggrieved against the judgment and decree passed by the trial court dated 3.3.2000 which was upheld by the first appellate court vide judgment and decree dated 29.11.2002. The trial court decreed the suit of the plaintiffs for declaration of easementary right and granted decree of mandatory injunction as well as prohibitory injunction holding that the property in

question is part of public chowk where the appellants have raised some construction of temporary nature.

According to learned counsel for the appellants, the two courts below have committed serious error of law in decreeing the suit because of the fact that the suit itself was filed after period of expiry of limitation and the notice published under Order 1 Rule 8 CPC was defective and further submitted that the construction raised by the defendants is within the building line, therefore, the courts below have committed serious error of fact as well as error of law in decreeing the suit of the plaintiffs. It is also submitted that the suit should have been dismissed because of lack of pleading only. Learned counsel for the appellants relied upon the judgment of Orissa High Court delivered in the case of Harihar Jena and others vs. Bhagabat Jena and others reported in AIR 1987 Orissa 270 wherein it has been held that the notice under the provision must disclose the nature of the suit as well as reliefs claimed therein in order to enable the persons interested to get themselves impleaded as parties in the suit either to support the cause or oppose it. The notice must also state as to who are the persons who have been selected to represent the cause. In that case, the notice having been not issued in above manner, therefore, the court held that the entire proceeding is vitiated.

Learned counsel for the appellants also relied upon the judgment of the Hon'ble Supreme Court in the case of Justiniano Antao and ors. vs. Smt. Bernadette B. Pereira

reported in 2005(1) WLC (SC) 295 wherein the lack of pleading was found fatal. In the above case, the Hon'ble Apex Court observed that the plaintiff has failed to establish that she has been using the access peacefully openly as of right for last 20 years and after holding so, reversed the judgment of High Court as well as of trial court and dismissed the suit of the plaintiff.

I have considered the submissions of learned counsel for the appellants and perused the facts of the case and record also and considered the judgments relied upon by learned counsel for the appellants.

It is clear from the facts that the suit was filed by the plaintiffs with specific allegation about chowk in question. They placed on record the sketch map also. They gave the exact measurement of the disputed property and thereafter narrated the facts about use of property. The specific issue was framed whether the property in question is public chowk and public way or not and whether the plaintiffs are using the way since last more than 100 years or not ? The issue no.2 reveals that the controversy arose when the temporary structure was raised by the defendants. Two courts below very specifically recorded a finding that the property in dispute was a part of public chowk and public is using the property. The courts below also held that even from the evidence of DW1 Dalip, DW2 Dharamveer and DW3 Dilbagh, the property in dispute appears to be of public chowk and is being used for way also. These are pure questions of facts which have been decided by the two

courts below after appreciation of evidence. In view of the above, in second appeal, the question of lack of pleadings cannot be raised. The parties were fully aware of all the facts of the case, led evidence on the issues and, therefore also, the question of lack of pleadings cannot be a ground for upsetting the judgments of the two courts below. However, it may be observed that this Court is not finding the pleadings lacking in any manner.

The question of limitation does not arise in this matter in view of fact that easementary right is not claimed on the other's property but it is a claim on the public chowk and way which gives continuous cause of action.

So far as defect in publication of notice is concerned, that hardly constitutes a substantial question of law and the appellants/defendants have not been prejudiced in any manner as they got full opportunity to contest the suit, therefore, this defence is not available to the defendants in second appeal.

In view of the above, I do not find that the courts below committed any error of law or any error of fact in passing the impugned judgments and decrees. No substantial question of law is involved in this appeal. Hence, this second appeal is dismissed with no orders as to costs.

(PRAKASH TATIA), J.

S.Phophaliya